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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re Marriage of VAHID and MEHRI  
KHALILI.

B167976

(Los Angeles County  
Super. Ct. No. BD012465)

VAHID RUBEN KHALILI,

Respondent,

v.

MEHRI A. KHALILI,

Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Richard E. Denner, Judge. Affirmed.

Carl Etting for Appellant.

No appearance for Respondent.

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After a hearing in which the trial court granted appellant Mehri A. Khalili's order to show cause re modification of child support (OSC), the court denied appellant's request for attorney fees. The trial court held that appellant had not established a right to attorney fees under Family Code sections 2030 and 2032,<sup>1</sup> because she did not comply with California Rules of Court, rule 5.128 (rule 5.128) by submitting her request on a Judicial Council FL-150 income and expense declaration. The trial court also held that it had no jurisdiction to rule on appellant's request for attorney fees as a prevailing party under section 3652.

Appellant contends on appeal that the trial court abused its discretion in denying her request for attorney fees under sections 2030, 2032 and 3652.

We find no abuse of discretion and affirm the order of the trial court.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Because respondent Vahid Ruben Khalili did not file a brief, we must decide this appeal "on the record, the opening brief, and any oral argument by the appellant." (See Cal. Rules of Court, rule 17(a)(2).)

In 1991, a judgment of dissolution was entered, dissolving the marriage of appellant and respondent. The court awarded custody of the couple's minor son to appellant, and in October 1999, entered an order requiring respondent to pay child support to appellant, in the amount of \$762 per month.

On November 20, 2002, appellant filed a postjudgment application for an order to show cause. In this application, appellant sought: (1) to increase the amount of child support, (2) to compel respondent to produce the child's health care insurance cards, and (3) payment of attorney fees by respondent. In support of this application, appellant submitted her completed "Financial Statement (Simplified)," and the declaration of Carl

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<sup>1</sup> Further statutory references are to the Family Code unless otherwise specified.

Etting, her attorney. Mr. Etting's declaration stated that appellant was requesting attorney fees under sections 2030 and 2032. Mr. Etting's declaration also provided information on his own professional experience, disclosed his fee arrangement with appellant, and set forth in some detail the legal work that he had done on her behalf.

On February 18, 2003, respondent filed an application for an order to show cause. This application sought to modify the existing child custody and visitation orders to permit respondent to spend more time with his son. The hearing on both appellant's application to modify the payment of child support and respondent's application to modify child custody and visitation took place on March 19, 2003, before Judge Richard E. Denner.

On respondent's application to modify child custody and visitation, the court found that respondent had failed to meet his burden in demonstrating changed circumstances. On that basis, the court modified the custody arrangements only to the extent consented to by appellant.

The court took appellant's application to modify child support payments under submission and on April 7, 2003, issued a minute order increasing the amount of child support to appellant from \$762 to \$1,131 per month. The court apparently based its order on the discrepancy in income between appellant and respondent. Appellant received \$700 per month of nontaxable income from her Social Security Disability, and respondent earned \$6,555 a month in "wages and salary." The trial court did not rule on the issue of appellant's attorney fees either during the March 19 hearing or in its April 7 minute order. Appellant filed a "Notice of Intention to Move for a New Trial and to Move to Vacate and Change Judgment" on April 16, 2003, seeking retroactive payment of the increase in child support to the time the OSC was served, and an award of attorney fees.

The motion was heard on May 27, 2003, and the court denied appellant's request for attorney fees under sections 2030 and 2032. The court noted that appellant had failed to comply with rule 5.128, which required her to submit an FL-150 "Income and Expense Declaration." The court found that the "Financial Declaration (Simplified)" that

appellant had submitted was not sufficient to address the issue of need-based attorney fees.

The court also denied appellant's request for attorney fees under section 3652, to which appellant had asserted she was entitled as the prevailing party in the OSC proceeding. Specifically, the trial court found that it had no jurisdiction to rule on a section 3652 fee request. Appellant has appealed the denial of attorney fees.

## **DISCUSSION**

Rule 5.128(a) of the California Rules of Court provides that “[a] current *Income and Expense Declaration* (form FL-150) . . . must be served and filed by any party appearing at any hearing at which the court is to determine an issue as to which such declarations would be relevant.” Rule 5.128(a) further provides that the income and expense declaration must be “sufficiently completed,” so as to allow determination of the relevant issue.

California Rules of Court, rule 5.128, subdivisions (b) and (c) directly address the issue of attorney fees. Subdivision (b) requires any party requesting attorney fees to fully complete the portion of the income and expense declaration “pertaining to the amount in savings, credit union, certificates of deposit, and money market accounts.” It also requires the requesting party to complete the section of the declaration “pertaining to the amount of attorney’s fees incurred, currently owed, and the source of money used to pay such fees.” (*Ibid.*) Subdivision (c) provides that a “*Financial Statement (Simplified)* is not appropriate for use in proceedings . . . to determine attorney’s fees.”

### ***1. Standard of Review***

On appeal, we review the trial court’s order denying appellant’s request for attorney fees for abuse of discretion. (See *In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575.) Under this standard, we must affirm the decision of the trial court unless we conclude that ““ . . . after calm and careful reflection upon the entire matter, it

can fairly be said that no judge would reasonably make the same order under the same circumstances. [Citation.]””” (Ibid.)

## **2. Denial of Attorney Fees Under Sections 2030 and 2032 Was Proper**

Section 2030 provides that “. . . the court may, upon (1) determining an ability to pay and (2) consideration of the respective incomes and needs of the parties in order to ensure that each party has access to legal representation to preserve all of the party’s rights, order any party . . . to pay the amount reasonably necessary for attorney’s fees and for the cost of maintaining or defending the proceeding.” (§ 2030, subd. (a).) In awarding attorney fees under section 2030, the court must determine that the making of the award, as well as the amount of the award, are “just and reasonable under the relative circumstances of the respective parties.” (§ 2032, subd. (a).)

In assessing one party’s relative need and the other party’s ability to pay in the context of section 2030, the court is “required to . . . consider the parties’ relative circumstances. . . . [including] the parties’ income, expenses and assets.” (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 631; see also *In re Marriage of Kelso* (1998) 67 Cal.App.4th 374, 384-385.) The court may also consider the respective parties’ “investment and income-producing properties.” (See *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167.) In considering these various factors, the court should keep in mind that the purpose of a section 2030 award is to ensure that a party in need has adequate resources to properly litigate the controversy at issue. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768; see also *In re Marriage of Kelso, supra*, 67 Cal.App.4th at pp. 384-385.)

Appellant contends that she is entitled to need-based attorney fees under section 2030 because there is a significant disparity in income between herself and respondent. But income alone may be insufficient to determine need-based attorney fees under section 2030. (See *In re Marriage of Duncan, supra*, 90 Cal.App.4th at pp. 630-631.)

In *In re Marriage of Duncan*, *supra*, 90 Cal.App.4th at pages 630-631, Wife requested that Husband pay the attorney fees that Wife had incurred during their dissolution proceeding. The trial court denied Wife's request, holding that she had sufficient resources of her own to fund the litigation. Wife appealed, claiming that the trial court abused its discretion in denying her request for attorney fees. Wife claimed that the trial court should have granted her request for attorney fees under section 2030, because Wife earned no income, while Husband earned more than \$1 million per month.

The Court of Appeal affirmed, holding that in denying Wife's request for fees, the trial court was correct to consider not only the parties' respective incomes, but also their expenses and assets. (*In re Marriage of Duncan*, *supra*, 90 Cal.App.4th at p. 631.) Therefore, the trial court did not abuse its discretion when it found Wife to have adequate resources to litigate the controversy, despite her lack of income, because Wife had "far greater liquid assets" than Husband. (*Ibid.*) According to the court in *In re Marriage of Duncan*, a disparity in the parties' respective incomes, without more, may be insufficient to establish need under section 2030. Rather, the trial court should also consider, *inter alia*, the parties' respective expenses and assets. (90 Cal.App.4th at page 631.)

Here, appellant failed to provide any information that would have enabled the court to make such a determination. Appellant's only evidence was that her income, in the form of Social Security Disability, was \$750 per month, and that her rent was \$700 per month. It is true that throughout the record appellant made several references to other expenses, such as payment for her son's clothing and extracurricular activities. But she never specified how much these expenses were. Furthermore, appellant failed to provide any information whatsoever on her savings, assets and property. (See rule 5.128 (b);

*In re Marriage of Duncan, supra*, 90 Cal.App.4th at p. 630; *In re Marriage of Drake, supra*, 53 Cal.App.4th at p. 1167.)<sup>2</sup>

Appellant argues that a denial of her request for attorney fees under sections 2030 and 2032 would amount to a triumph of form over substance. We disagree. Appellant's failure to comply with rule 5.128 goes to the very heart of her claim. By not completing a FL-150 income and expense declaration, appellant omitted critical financial information necessary to enable the court to make a need-based award.<sup>3</sup> We have carefully reviewed the record and find that appellant did not provide this financial information on any alternative form, or in any of her declarations.<sup>4</sup> Therefore, we reject appellant's attempt to characterize her case as one in which she provided all the requisite information, but merely did so on the wrong form. Rather, it is clear that appellant failed to provide the requisite information altogether. The trial court did not err in denying appellant's request for fees on that basis.

Based on the failure of appellant to provide essential financial information which would have enabled the trial court to assess her needs, we cannot say that the trial court abused its discretion in denying her request for attorney fees under sections 2030 and 2032.

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<sup>2</sup> Appellant's counsel asserted at one point that the court should order respondent to pay appellant's attorney fees because appellant "has no funds or assets to pay for the same." But counsel never provided any evidentiary support for his assertion.

<sup>3</sup> We note rule 5.128 unambiguously provides for use of a FL-150 form in a request for attorney fees, and further states that "[a] *Financial Statement (Simplified)* is not appropriate for use in proceedings . . . to determine attorney's fees." The instructions on the "Financial Statement (Simplified)," which appellant filed, provide that the simplified form is insufficient if a party is seeking attorney fees.

<sup>4</sup> We note that after the trial court denied appellant's request for attorney fees for failure to comply with rule 5.128, appellant's counsel did not request a continuance in order to submit such information.

### **3. *The Court Did Not Abuse Its Discretion in Denying Attorney Fees Under Section 3652***

Section 3652 provides that “[e]xcept as against a governmental agency, an order modifying, terminating, or setting aside a support order may include an award of attorney’s fees and court costs to the prevailing party.”

In her opening brief, appellant contends that even if the court could not have awarded appellant need-based attorney fees under sections 2030 and 2032, it could have awarded appellant such fees under section 3652, on the basis that appellant was the prevailing party in the proceedings below. In support of her argument, appellant refers this court to footnote 3 of *Boutte v. Nears* (1996) 50 Cal.App.4th 162, 166.<sup>5</sup>

We find appellant’s reliance upon *Boutte* inapposite. The issue before the court in *Boutte* was whether, in a proceeding to modify child support under section 4062, the court may award attorney fees to one party, but characterize such fees as “supplemental child support.” (*Boutte v. Nears, supra*, 50 Cal.App.4th at p. 166.) While the court in *Boutte* did allude to section 2030 in passing, the court did not discuss at any length section 2030’s relationship to section 3652. Nor did the court clarify in any way the applicability of the two provisions in the context of one another. (See *Boutte v. Nears*, at p. 166, fn. 3.) As such, this citation is of little help to appellant.

We think that *In re Marriage of Popenhager* (1979) 99 Cal.App.3d 514 is more applicable here. In *Marriage of Popenhager*, Wife and Husband both claimed attorney

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<sup>5</sup> The *Boutte* footnote upon which appellant relies states as follows: “Section 3652 provides: ‘Except as against a governmental agency, an order modifying or terminating a child support order may include an award of attorney’s fees and costs to the prevailing party’ We note that in dissolution proceedings an award of attorney fees may also be premised on the relative incomes and needs of the parties. (§ 2030.) An award based on financial need has been considered in the nature of support and thus nondischargeable. [Citation.] However, the award in the present paternity proceeding under section 3652 stands on no such footing.” (*Boutte v. Nears, supra*, 50 Cal.App.4th at p. 166, fn. 3.)



fees in a consolidated action for the modification of child support arrearages and payments. (*Id.* at pp. 519-520.) Wife claimed fees under section 4370 of the Civil Code,<sup>6</sup> on the basis of financial need. (See *Marriage of Popenhager*, at p. 524.) Husband claimed attorney fees under section 4700 of the Civil Code,<sup>7</sup> on the basis that he was the prevailing party to the action. (See *Ibid.*) The Court of Appeal noted that either sections of the code was applicable (*Marriage of Popenhager* at p. 525) but then went on to state: “where both statutes apply, Civil Code section 4370 [2030] should control . . . [and] [a]pplication of section 4700 [3652] then is appropriate *only in the situation where a lower court has first found that both parties to the proceeding could otherwise afford to pay their own attorney fees.*” (*Ibid.*, italics added.)

Contrary to what appellant would have us believe, the court in *Marriage of Popenhager* concluded that an award of attorney fees under section 3652 does depend, at least in part, on the respective financial status of the parties to the litigation. (See *Marriage of Popenhager, supra*, 99 Cal.App.3d at p. 525.) As we have already concluded that appellant failed to provide information that would have allowed the court to determine her financial status in the context of section 2030, we hold that the trial court did not abuse its discretion in denying appellant’s request for attorney fees under section 3652.

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<sup>6</sup> The relevant portions of Civil Code section 4370 and section 2030 are synonymous. (See *In re Marriage of Read* (2002) 97 Cal.App.4th 476, 480 [stating that section 2030 “continues former Civil Code section 4370, subdivision (a) without substantive change”]; *Guardianship of Elan E.* (2000) 85 Cal.App.4th 998, 1003 [noting that Civ. Code, § 4370 is now § 2030].)

<sup>7</sup> The relevant portions of Civil Code section 4700 and section 3652 are synonymous. (See *In re Marriage of Lurie* (1995) 33 Cal.App.4th 658, 678-679 [noting that section 3652 was formerly section 4700, subd. (a) of the Civ. Code].)

**DISPOSITION**

The order of the trial court is affirmed.

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\_\_\_\_\_, J.  
DOI TODD

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
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